Kerajaan Malaysia v Kumpulan Liziz Sdn Bhd (formerly known as Kumpulan Liziz Bhd) & Ors

HIGH COURT (IPOH) — CIVIL SUIT NO AA-21NCVC-2–02 OF 2020
SU TIANG JOO JC
8 FEBRUARY 2021

Civil Procedure — Summary judgment — Application for — Income tax — Whether there was non-service of notices of tax assessment and additional assessments — Whether notices of tax assessments and additional assessments were valid and accurate — Whether plaintiff's affidavit in support of the application was defective in omitting to state the deponent's belief that there was no defence to claim — Whether irregularities in form of affidavit can be cured could rely on affidavit deposing that there was 'no defence with merit' rather than deposing 'there is no defence' — Whether application could be allowed — Rules of Court 2012 O 14 r 2(1)

This was an application by the plaintiff for summary judgment to be entered against the second and third defendants for income tax eligible to the sum of RM5,592,661.43 together with interest and costs. The plaintiff was the Government of Malaysia. The first defendant was a private company incorporated in Malaysia. The second and third defendants were directors of the first defendant at the material time having 70% and 30% shareholding respectively. The plaintiff claimed that the first defendant has failed and/or neglected its responsibility to pay income tax inclusive of penalties for the years of assessment 2012, 2013, 2014, 2015, 2017 and 2018. A judgment in default of appearance was entered against the first defendant for the sum of RM5,592,661.43 together with interest thereon at 5%pa from the date of judgment until full settlement and costs of RM552. The plaintiff then relied upon s 75A of the Income Tax Act 1967 ('the ITA') to impose liability upon the second and third defendants as directors of the first defendant to pay the sum of tax claimed. The plaintiff applied pursuant to O 14 r 1 of the Rules of Court 2012 ('the ROC') for judgment to be entered against the second and third defendant summarily. The plaintiff's application was supported by an affidavit ('the affidavit in support') deposed by Nurulakma bt Ahmad Najri described as a Pembantu Hasil of the Inland Revenue Board of Malaysia who after verifying the facts of the plaintiff's claim stated that she verily believed that the defendants had 'no defence with merits'. In their affidavits in reply, the defendants challenged the accuracy of the notices of assessments and additional assessments and averred that in any event these notices were not served on the first defendant at its registered office. The defendants also emphasized on the fact that the affidavit in support deposed that the defendants had 'no defence

with merits' instead of there was 'no defence to the claim' as required under O 14 r 2(1), Form 13 and O 73 r 5(2) of the ROC. The issues for consideration were: (a) whether there was non-service of notices of tax assessment and additional assessments on the defendants; (b) whether the notices of tax assessment and additional assessments were valid and accurate; and (c) whether the deposition on affidavit that there was 'no defence with merits' was equivalent to saying 'there is no defence' in an application for summary judgment.

Held, allowing the plaintiff's application for summary judgment to be entered against the second and third defendants with cost of RM4,000:

(1) In the affidavit in reply by Nurulakma bt Ahmad Najri, it was pointed out that the defendants themselves had requested that instead of using their registered office address of No 33–11–1, Lorong Ruang Grace Square, 88000 Kota Kinabalu, Sabah, the address of No 27 Jalan Perajurit, Taman Ipoh Timor, 31400 Ipoh, Perak was to be used and this was in fact used for service of documents. There was no rebuttal by the second and third defendants to this positive averment and thus the court was of the view that the challenge on the lack of proper service of documents was without merit. Indeed, by a letter dated 3 October 2019, under the letterhead of the first defendant carrying the address of No 27A Jalan Perajurit, Ipoh Garden East, 31400 Ipoh, Perak and signed off by the second defendant, the first defendant had sought to defer payment of the income tax instalments. The court therefore accepted the plaintiff's averment that the defendants well knew of the notices of assessment and additional assessments and their denial of the same was a mere afterthought bereft of merit (see paras 25–28).

(2) There was no issue as to the validity of the notices of tax assessment and additional assessments due to the defendants making no attempts to have the judgment in default of appearance to be set aside, in failing to have the judgment in default to be set aside within 30 days pursuant to O 42 r 13 of the ROC, as well as the defendants failure to appeal to the Special Commissioners for Income Tax against the notices of assessment and additional assessment as prescribed under s 99 of the ITA, renders the notices of tax assessment and additional assessments to be valid (see paras 35–38).

(3) The plaintiff in deposing an affidavit that the defendants had no defence with merit was as good as deposing that the defendants had no defence in the circumstances of this case so as to enable the court to do its duty to allow a summary judgment to be entered by virtue that the trial judge has absolute discretion to do justice (see paras 43–45).

(4) The words 'with merits', was at best a surplusage to underscore the point being made that there was no defence. This surplusage was a form of mere

technical non-compliance and should not be allowed to stand in the way of having regards to the overriding interest of justice. The second and third defendants were not prejudiced in any way. If at all, the affidavit was only irregular in form, and pursuant to O 41 r 4 of the ROC, the court allowed it to be used in evidence (see paras 48–49).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pihak plaintif untuk memasukkan penghakiman terus terhadap defendan kedua dan ketiga untuk cukai pendapatan yang layak dikenakan berjumlah RM5,592,661,43 berserta faedah dan kos. Plaintif adalah Kerajaan Malaysia. Defendan pertama adalah syarikat swasta yang diperbadankan di Malaysia. Defendan kedua dan ketiga adalah pengarah defendan pertama pada masa yang material masing-masing mempunyai 70% dan 30% pegangan saham. Plaintif mendakwa bahawa defendan pertama telah gagal dan/atau cuai dalam tanggungjawabnya untuk membayar cukai pendapatan termasuk penalti untuk tahun taksiran 2012, 2013, 2014, 2015, 2017 dan 2018. Penghakiman ingkar kehadiran telah dimasukkan terhadap defendan pertama bagi jumlah RM5,592,661,43 berserta faedah pada kadar 5% setahun dari tarikh penghakiman sehingga penyelesaian penuh dan kos sebanyak RM552. Plaintif kemudiannya bergantungan kepada s 75A Akta Cukai Pendapatan 1967 ('ACP') dalam mengenakan tanggungan ke atas defendan kedua dan ketiga sebagai pengarah defendan pertama untuk membayar jumlah cukai yang dituntut. Plaintif memohon menurut A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') bagi penghakiman dimasukkan terhadap defendan kedua dan ketiga secara terus. Permohonan plaintif disokong oleh satu afidavit ('afidavit sokongan') yang diirkarkan oleh Nurulakma bt Ahmad Najri yang dirujuk sebagai Pembantu Hasil dari Lembaga Hasil Dalam Negeri Malaysia yang setelah mengesahkan fakta tuntutan plaintif menyatakan bahawa beliau benar-benar percaya bahawa defendan tidak mempunyai pembelaan pada merit. Dalam afidavit mereka sebagai jawapan, defendan mencabar ketepatan notis taksiran dan penilaian tambahan dan menyatakan bahawa dalam keadaan apa pun notis tersebut tidak disampaikan kepada defendan pertama di pejabat berdaftarnya. Defendan juga menegaskan pada kenyataan bahawa afidavit sokongan yang diirkarkan bahawa defendan tidak 'tidak mempunyai pembelaan pada merit' dan bukannya 'tidak ada pembelaan terhadap tuntutan' seperti yang diperuntukkan di bawah A 14 k 2(1), Borang 13 dan A 73 k 5(2) KKM. Isu-isu yang perlu dipertimbangkan adalah: (a) sama ada terdapat ketiadaan penyampaian notis taksiran cukai dan penilaian tambahan kepada defendan; (b) sama ada notis taksiran cukai dan penilaian tambahan tersebut sah dan tepat; dan (c) sama ada afidavit yang diikirarkan bahawa 'tidak ada pembelaan pada merit' setara dengan mengatakan 'tidak ada pembelaan' dalam permohonan penghakiman terus.

Diputuskan, membenarkan permohonan plaintif bagi penghakiman terus

dimasukkan terhadap defendan kedua dan ketiga dengan kos RM4,000:

(1) Dalam afidavit balasan oleh Nurulakma bt Ahmad Najri, ianya telah dinyatakan bahawa defendan sendiri yang memohon agar tidak menggunakan alamat pejabat berdaftar No 33–11–1, Lorong Ruang Grace Square, 88000 Kota Kinabalu, Sabah, tetapi sebaliknya alamat No 27 Jalan Perajurit, Taman Ipoh Timor, 31400 Ipoh, Perak harus digunakan dan ini yang sebenarnya digunakan untuk penyampaian dokumen tersebut. Tidak ada bantahan oleh defendan kedua dan ketiga terhadap penyataan positif ini dan oleh itu mahkamah berpendapat bahawa bantahan pada kurangnya penyampaian dokumen secara teratur adalah tanpa merit. Selanjutnya, melalui surat bertarikh 3 Oktober 2019, di bawah kepala surat defendan pertama yang mempunyai alamat No 27A Jalan Perajurit, Ipoh Garden East, 31400 Ipoh, Perak dan ditandatangani oleh defendan kedua, defendan pertama telah berusaha untuk menangguhkan pembayaran ansuran cukai pendapatan. Oleh itu, mahkamah menerima penyataan plaintif bahawa defendan mempunyai pengetahuan penuh tentang notis taksiran dan penilaian tambahan dan penafian mereka terhadap perkara tersebut hanyalah suatu pemikiran semula tanpa merit (lihat perenggan 25–28).

(2) Tidak ada isu pada kesahan notis taksiran cukai dan penilaian tambahan oleh kerana defendan tidak membuat cubaan untuk mengetepikan penghakiman ingkar kehadiran, gagal untuk mengetepikan penghakiman ingkar dalam masa 30 hari menurut A 42 k 13 KKM, serta kegagalan defendan merayu kepada Pesuruhjaya Khas Cukai Pendapatan terhadap notis taksiran dan penilaian tambahan seperti yang ditetapkan di bawah s 99 ACP, menjadikan notis taksiran cukai dan penilaian tambahan adalah sah (lihat perenggan 35–38).

(3) Plaintif dalam mengikrarkan afidavit bahawa defendan tidak mempunyai pembelaan pada merit adalah setara dengan menyatakan bahawa defendan tidak mempunyai pembelaan dalam keadaan kes ini sehingga membolehkan mahkamah menjalankan tugasnya untuk membenarkan penghakiman terus dimasukkan berdasarkan hakikat bahawa hakim perbicaraan mempunyai budi bicara mutlak untuk melaksanakan keadilan (lihat perenggan 43–45).

(4) Perkataan 'tanpa merit', yang terbaik adalah penyataan untuk merendahkan perkara yang dibuat bahawa tidak ada sebarang pembelaan. Penyataan ini adalah bentuk ketidakpatuhan teknikal semata-mata dan tidak boleh dibenarkan menghalang berkenaan dengan kepentingan keadilan. Defendan kedua dan ketiga sama sekali tidak diprejudiskan. Sekiranya benar, afidavit tersebut hanya tidak teratur dalam bentuk, dan menurut A 41 k 4 KKM, mahkamah membenarkannya digunakan dalam keterangan (lihat perenggan 48–49).]

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9, SC (refd)

Coles and Ravenshear's Arbitration, Re [1907] 1 KB 1, CA (refd)

Dr Sengupta and another v Holmes and others [2002] EWCA Civ 1104, CA (refd)

Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276; [1974] 1 LNS 40 (refd)

Government of Malaysia v Mohd Najib bin Hj Abd Razak [2020] 12 MLJ 580; [2020] 9 CLJ 723, HC (refd)

Imtiaz Ahmad v Ghulam Ali PLD 1963 SC 382 (refd)

Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib [2020] 11 MLJ 242; [2020] 9 CLJ 414, HC (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385; [2002] 1 CLJ 645, FC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283, FC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [2000] 1 CLJ 503, CA (refd)

Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal [2005] 3 MLJ 97; [2004] 2 CLJ 265, FC (refd)

Sun Man Tobacco Co Ltd v Government Of Malaysia [1973] 2 MLJ 163; [1973] 1 LNS 144, FC (refd)

Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd [1988] 3 MLJ 218, HC (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561; [2001] 2 CLJ 31, CA (refd)

Wasif v Secretary of State for the Home Department; Hossain v Secretary of State for the Home Department [2016] 1 WLR 2793, CA (refd)

Legislation referred to

Income Tax Act 1967 ss 75A, 99, 103(2), (3), (5), (7), 106, 106(3), 134(2), 142(1), (2)

Rules of Court 2012 O 1A, O 14, O 14 rr 1, 2, 2(1), O 41 r 4, O 42 r 13, O 73, O 73 r 5(2), Form 13

Rules of the High Court 1980 O 14

Norhidayah Anas (Federal Counsel, Inland Revenue Board) for the plaintiff.

CT Tenh (SK Tenh with him) (CK Lim, Tenh & Chong) for the first, second and third defendants.

Su Tiang Joo JC:

INTRODUCTION

[1] The plaintiff applied for summary judgment to be entered against defendants two and three for income tax exigible to the sum of RM5,592,661.43 together with interest thereon at 5%pa from the date of judgment until full satisfaction and costs.

PLAINTIFF'S ACTION

[2] The plaintiff is the Government of Malaysia.

[3] The first defendant ('D1') is a private company incorporated in Malaysia.

[4] The second and third defendants ('D2 and D3') are directors of D1 having 70% and 30% shareholding respectively in D1.

[5] In this action, (encl 1 is the writ and encl 2 is the statement of claim) the plaintiff claimed that D1 has failed and or neglected its responsibility to pay income tax inclusive of penalties to the sum of RM5,592,661.43 for the years of assessment 2012, 2013, 2014 and 2015 and for the years of assessment 2017 and 2018. For the years of assessment for 2012, 2013, 2014 and 2015 the amount claimed were for additional assessments.

[6] D1 did not defend the claim and on 19 May 2020 judgment in default of appearance ('encl 9') was entered against D1 to the sum of RM5,592,661.43 together with interest thereon at 5%pa from the date of judgment until full settlement and costs of RM552.

[7] D2 and D3 were the directors at the material time ie during the years of assessment for the income tax exigible by D1 (encl 17 paras 3 and 4; encl 18 paras 9 and 10 and encl 19 paras 9 and 10).

[8] The plaintiff relies upon s 75A of the Income Tax Act 1967 (Revised 1971) ('the ITA') to impose liability upon D2 and D3 as directors of D1 to pay the sum of tax claimed to the sum of RM5,592,661.43.

[9] Section 75A of the ITA is reproduced below:

Director's liability

(1) Notwithstanding anything contrary to this Act or any other written law: **A**

(a) where any tax is due and payable under this Act by a company, *any person who is a director of that company during the period in which that tax is liable to be paid by that company;* or

(b) where any debt is due and payable from an employer under any rules made pursuant to section 107 and the employer is a company, any person who is a director of that company during the period in which the debt is liable to be paid by that company, **B**

shall be jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under section 106 *from that person*. **C**

(2) In this section, *'director' means any person who*:

(a) *is occupying the position of director* (by whatever name called), including any person who is concerned in the management of the company's business; *and* **D**

(b) is, either on his own or with one or more associates within the meaning of subsection 139(7), *the owner of, or able directly or through the medium of other companies or by any other indirect means to control, not less than twenty per cent of the ordinary share capital of the company* ('ordinary share capital' here having the same meaning as in the definition of 'director' in section 2). **E**

[10] Seeing that s 106 is mentioned in s 75A of the ITA, the provisions of the same is reproduced below:

(1) *Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.* **F**

(2) The Director General and all authorized officers shall be deemed to be public officers authorized by the Minister under subsection 25(1) of the Government Proceedings Ordinance 1956*, in respect of all proceedings under this section. **G**

(3) *In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under* sub-s 103(3), (5) or (7).

* Note — Now the Government Proceedings Act 1956 [Act 359] **H**

(Emphasis added.)

[11] Subsections 103(3), (5) and (7) provide as follows:

(3) Where any tax due and payable under subsection (1) has not been paid by the due date, so much of the tax as is unpaid upon the expiration of that date shall **I** without any further notice being served be increased by a sum equal to ten per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.

(4) (Deleted by Act 823: s 15)

(5) Subject to subsection (7), where any tax due and payable under subsection (2) has not been paid within thirty days after the service of the notice, so much of the tax as is unpaid upon the expiration of that period shall without any further notice being served be increased by a sum equal to ten per cent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.

(6) (Deleted by Act 823: s 15)

(7) Where any tax is payable in accordance with subsection (2), the Director General may allow the tax to be paid by instalments in such amounts and on such dates as he may determine and in the event of default in payment of any one instalment on the date specified for payment the balance of the tax then outstanding shall be due and payable on that date and shall without any further notice being served be increased by a sum equal to ten per cent of that balance, and that sum shall be recoverable as if it were tax due and payable under this Act.

APPLICATION FOR SUMMARY JUDGMENT AGAINST D2 AND D3 (ENCL 15)

[12] The plaintiff applied pursuant to O 14 r 1 ('O 14 r 1') of the Rules of Court 2012 ('encl 15') for judgment to be entered against D2 and D3 summarily ie without having to go for trial. The provisions of O 14 r 1 are reproduced hereunder:

(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, *on the ground that the defendant has no defence* to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

[13] The manner in which an application for summary judgment is to be made is provided for under O 14 r 2 which is set out hereunder:

(1) *An application under rule 1 must be supported by an affidavit in Form 13* verifying the facts on which the claim, or the part of a claim, to which the application relates is based and *stating that in the deponent's belief there is no defence* to that claim or part, as the case may be, or no defence except as to the amount of damages claimed. (Emphasis added.)

[14] It is undisputed that the statement of claim ('encl 2') had been served upon both D2 ('encl 11 para 3') and D3 ('encl 12 para 3') on 20 July 2020 and that both D2 and D3 have each entered an appearance in this action ('encl 10').

[15] The plaintiff's application ('encl 15') for summary judgment is supported by an affidavit ('encl 17') deposed by Nurulakma bt Ahmad Najri described as a *pembantu hasil di Lembaga Hasil Dalam Negeri Malaysia* who after verifying the facts of the plaintiff's claim stated that she verily believed

that the defendants have *no defence with merits ('tidak ada pembelaan bermerit'* ('encl 17 para 34'). (Emphasis added.)

[16] In the oft-quoted case of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ Rep 283 on summary judgment applications, the Federal Court speaking through the late George Seah FJ held that once the considerations under O 14 r 2 are satisfied:

> the plaintiff will have established a prima facie case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

[17] With this being a claim for recovery of tax under the ITA, the plaintiff relied upon the authority of *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9 where the Supreme Court agreed and approved of the following dictum of Arulanandom J (as he then was) in the case of *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276; [1974] 1 LNS 40 when he said:

> *When proceedings are commenced under O 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under s 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the government under s 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the government the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under s 103(4) or (5)*. In this case the Director-General had exercised his powers under s 91(1) of the Act and made additional assessments and added penalties which were provided for by the Act. Since the amount was not paid within 30 days further penalties were added and since that was not paid civil proceedings were brought to recover the tax as a debt due to the government. Under s 103(1) regarding payment of tax, the section reads:
>
> > 103(1) Subject to this section, tax payable under an assessment for a composite assessment shall on the service of the notice of assessment or composite assessment on the person assessed be due and payable at the place specified in that notice whether or not that person appeals against the assessment or composite assessment, as the case may be.
> >
> > It is therefore quite clear that the Act does not contemplate any finality of assessment as it is clearly required in the Act that *the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not.*
> >
> > We were satisfied that in this case there are no triable issues and therefore dismissed the taxpayer's appeal with costs. (Emphasis added.)

A D2 AND D3'S POSITION

[18] In their affidavits in reply ('encls 18 and 19') as well in their written submissions ('encl 22'), D2 and D3 challenged the accuracy of the notices of assessment and notices of additional assessment and that in any event these were not served upon D1 at its registered office of No 81 (2nd Floor), Jalan Market, 30000 Ipoh, Perak.

[19] Emphasis was laid by D2 and D3 upon the fact that the affidavit in support ('encl 17') of the application deposed that the defendants *have no defence with merits* instead of there is *no defence to the claim* as is required under O 14 r 2(1), Form 13 and O 73 r 5(2) and by reason of this the application ought to be dismissed with costs.

[20] O 73 of the Rules of Court 2012 sets out the procedure in proceedings by and against the Government and O 73 r 5(2) provides as follows:

> Where an application is made by the Government under Order 14, rule 1, Order 14, rule 5 or Order 81, rule 1, the affidavit required in support of the application may be made by:
>
> (a) the solicitor acting for the Government; or
>
> (b) an officer duly authorized by the solicitor so acting or by the department concerned,
>
> and the affidavit shall be sufficient if it states that in the deponent's belief the applicant is entitled to the relief claimed and there is *no defence to the claim* or part of a claim to which the application relates or no defence except as to the amount of any damages claimed. (Emphasis added.)

[21] In support of their submissions, reliance was placed upon the following excerpt from the Federal Court authority of *National Company for Foreign Trade v Kayu Raya Sdn Bhd*:

> It is to be observed that a case is not within O 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) *where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim* or part to which the application relates; and (d) where the application is made in an action against the government (O 73 r 5(1)).
>
> *If the plaintiff fails to satisfy either of these considerations, the summons may* be dismissed. (Emphasis added.)

[22] D2 and D3 sought to rely upon the recent decision of *Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib* [2020] 11 MLJ 242; [2020] 9 CLJ 414 (HC), where Faizah Jamaludin J held as follows:

Is the plaintiff's application for summary judgment made on the basis that the defendant has no defence to its claim?

[53] As held by the Federal Court in the *National Company for Foreign Trade* and as stipulated in O 73 r 5(2), for an application for summary judgment by the government to fall within O 14 rule, the deponent of the plaintiff's affidavit in support, must state his belief that the plaintiff is entitled to the relief claimed and there is no defence to the claim.

[54] In the application in encl 8, the plaintiff's reason for applying for summary judgment is not that the defendant has no defence to its claim but that the defendant has no defence with merits ('defendan tiada pembelaan bermerit'). Additionally, the deponent of the plaintiff's affidavit in support, Puan Adrina bt Ahmad Dahlan, did not state her belief that there is no defence to the claim. Instead, she stated in para 25 of her affidavit in support that she is advised and truly believes that the defendant 'has no defence with merits'. Paragraph 25 of her affidavit in support is reproduced below:

> 25. Seterusnya saya telah dinasihatkan dan sesungguhnya mempercayai bahawa Defendan *tidak ada pembelaan bermerit* di dalam tuntutan ini dan Plaintif berhak mendapatkan relif yang dituntut. (Emphasis added)

[55] As discussed above, the general rule of summary judgments is that judgments can only be entered summarily where there is a 'no defence' to a plaintiff's claim. The plaintiff's application must be supported with an affidavit stating to the deponent's belief that there is 'no defence' to the claim. Judgments can be entered summarily against a defendant without trial if the court is satisfied that the defendant has no defence to the plaintiff's claim and does not raise any triable issues.

[56] The exception to the general rule is that a defendant may not raise triable issues in summary judgment applications for proceedings by the Government for recovery of tax due under s 106(1) of the ITA.

[57] However, the summary judgment rules regarding evidence of amount claim and 'no defence' still applies. Therefore, [the] government must provide sufficient evidence of the amount tax claimed and that the deponent of the affidavit in support of the government's application for summary judgment must state his belief verifying the facts on which the claim is based and that the defendant has no defence to the claim.

[58] As opposed to trials where evidence is tendered through witnesses who can be examined and cross-examined, the courts have to decide a plaintiff's application for summary judgment by way of affidavit evidence only. It is settled law that in a hearing by way of affidavit evidence, it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavits: see Mohd Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors* and Lord Diplock in the Privy Council decision in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212; [1979] 1 LNS 18. Additionally, it is settled law, when dealing with conflicting affidavit evidence, a court can only consider evidence that is undisputed or uncontroverted: see Lord Templeman's dicta in the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] 1 CLJ 441; [1987] CLJ Rep 24; [1987] 1 WLR 413 setting out the principles as regards affidavit evidence, which principles were

applied by the Court of Appeal in *Diana Clarice Chan Chiing Hwa v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 1 CLJ 721; [2002] 2 AMR 1527.

[59] *In this instant case, the natural and ordinary meaning in the plaintiff's application for summary judgment and the deponent's averment that the defendant 'has no defence with merits' is that the defendant has a defence but the defence is without merits.* Therefore, there is a conflict of evidence on the plaintiff's affidavit in support with the defendant's affidavit in reply. *The plaintiff says that the defendant's defence is without merits, whereas the defendant says that her defence is with merits because the tax assessments are without basis, grossly inaccurate and time barred for YA 2011 and YA 2013.*

[60] Whether a defendant's defence is with or without merits, is a question that ought to be decided at trial, and cannot be decided summarily. As established in *Sun Man Tobacco Co Ltd v Government of Malaysia; Chong Woo Yit v Government of Malaysia*; and *Government of Malaysia v Abdul Rahman*, the normal rules of triable issues do not apply to the Government's application for summary judgment for proceedings under s 106 of the ITA.

[61] Therefore, by stating that the defendant has no defence with merits, the plaintiff is raising triable issues which this court is not allowed to consider under O 14 and which do not apply to summary judgment applications by the Government for claims of tax due by virtue of s 106(3) of the ITA.

[62] Moreover, the deponent's failure to aver her belief that the defendant has no defence to the plaintiff's claim renders the affidavit defective since it is contrary to the express requirements of O 14 r 2. As held by the Federal Court in National Company for Foreign Trade the failure of a deponent of an affidavit in support of an application for summary judgment under O 14 to state his belief the defendant has no defence to the plaintiff's claim, makes the affidavit defective. Additionally, pursuant to O 73 r 5(2), the deponent's failure to state that the defendant has no defence makes the affidavit insufficient to support the government's application for summary judgment under O 14 r 1.

DECISION ON PLAINTIFF'S APPLICATION FOR SUMMARY JUDGMENT

[63] Accordingly, this court is unable to grant the plaintiff summary judgment for its claim for tax due and payable for YAs 2011 to 2017 against the defendant for the following reasons:

(a) *First, the plaintiff did not provide sufficient evidence to prove the amount of tax due and payable claimed from the defendant in this suit. The certificate exhibited in the plaintiff's affidavit in support is not sufficient evidence of the amount of tax due and payable by the defendant. It is also not sufficient authority for this court to give judgment for the amount stated on the certificate under s 142(1) of the ITA because (a) the certificate was not signed by the DGIR as required by s 142(1) of the ITA; and (b) there is no evidence that Puan Zainun bt Ahmad, Ketua Penolong Pengarah, Cawangan Guaman Kuala Lumpur, who signed the certificate was an officer gazetted to exercise any function of the DGIR under ITA under s 136(2) of the ITA, or was authorised by the DGIR 'in writing under his hand' under s 136(5) of the ITA to exercise or assist in exercising the DGIR's function of signing the certificate.*

(b) *Secondly, the plaintiff failed to establish a prima facie case that the defendant has no*

defence to its claim as the plaintiffs application for summary judgement is not made on the ground that the defendant has no defence as required under O 14 r 1. Additionally, the deponent of the plaintiffs affidavit in support of its application did not state her belief that there is no defence to the plaintiffs claim, as required under O 14 r 2 and O 73 r 5(2) of the ROC.

[64] Therefore, the plaintiff's application for summary judgment for its claim against the defendant for tax due and payable for YAs 2011 to 2017 is dismissed.

[65] I must make it clear that this court's decision to dismiss the plaintiff's application for summary judgment in encl 8 is not a decision on the merits of the plaintiff's claim for the tax due and payable by the defendant for the YAs 2011 to 2017. Nor is it a decision on the merits of defendant's defence.

[66] The defendant has appealed against the tax assessments and the IRB has forwarded her appeal to the Special Commissioner for Income Tax. Accordingly, the veracity of the tax assessments and the merits of defendant's defence are questions of facts to be determined by the Special Commissioners of Income Tax at the hearing of the defendant's appeal before them. (Emphasis added.)

COURT'S FINDINGS

Non-service of notices of assessment and additional assessments

[23] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14 it was held by the Supreme Court that:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application.

[24] With the above in mind, the court turns to the challenge raised by the D2 and D3 on the purported erroneous address for service of the notices of assessment and additional assessments.

[25] It was as pointed out in the affidavit in reply by Nurulakma bt Ahmad Najri (encls 20 and 21, both at para 4) that the defendants themselves had requested that instead of using their registered office address of No 3311–1, Lorong Ruang Grace Square, 88000 Kota Kinabalu, Sabah, the address of No 27 Jalan Perajurit, Taman Ipoh Timor, 31400 Ipoh, Perak was to be used and which was in fact used for service of documents.

[26] There was no rebuttal by D2 and D3 to this positive averment and thus the court is of the view that the challenge on the lack of proper service of documents is without merit. In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [2000] 1 CLJ 503 the Court of Appeal cited with approval and applied the following principle that:

> Now, it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted: *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382; [1986] CLJ 45; *Overseas Investment Pte Ltd v Anthony William O' Brien & Anor* [1988] 3 MLJ 332 ...

[27] Indeed, by letter dated 3 October 2019, under the letterhead of D1 carrying the address of No 27A Jalan Perajurit, Ipoh Garden East, 31400 Ipoh, Perak (encl 20 exh NAAN2) and signed off by D2, D1 had sought to defer payment of the income tax instalments.

[28] Wherefore, the court accepts the plaintiff's averment (encl 21 para 7) that the defendants well knew of the notices of assessment and additional assessments (encl 17 exh NAAN2) and their denial of the same is a mere afterthought bereft of merit.

Accuracy and validity of the notices of (tax) assessments and additional assessments'

[29] Unlike the defendant in the case of *Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib*, a thorough study of the defence ('encl 14') and the affidavits filed ('encls 18 by D1 and 19 by D2') show that there was *no appeal* by any of the defendants (D1, D2 and D3) against any of the notices of assessment and additional assessment of tax to the Special Commissioners for Income Tax. (Emphasis added.)

[30] As was held by the Federal Court in *Sun Man Tobacco Co Ltd v Government Of Malaysia* [1973] 2 MLJ 163; [1973] 1 LNS 144:

> if the taxpayer wished to dispute that the amount of tax sought to be recovered was excessive, incorrectly assessed, under appeal or incorrectly assessed he has to do so by way of appeal to the Special Commissioners.

[31] In any event, even if the defendants had appealed to the Special Commissioners for Income Tax, under s 106(3) of the ITA, the court is not to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased and under s 103(2) of the ITA, the moment the notice of assessment is served on the taxpayer the tax becomes payable whether the taxpayer appeals against the amount or not;

see *Chong Woo Yit v Government of Malaysia*.

[32] Further, unlike in the case of *Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib*, the plaintiff herein had duly exhibited the *gazette* notification (encl 20 exh NAAN3 and encl 21 exh NAAN3) of the appointment of Siti Zaliha bt Ghazali as Principal Assistant Director pursuant to s 134(2) of the ITA. This officer had issued the certificate against D1, D2 and D3 pursuant to s 142(1) of the ITA for and on behalf of the Ketua Pengarah Lembaga Hasil Dalam Negeri, Malaysia.

[33] Sections 142(1) and (2) of the ITA provides that:

> (1) In a suit under section 106 the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgement for that amount.
>
> (2) In criminal or civil proceedings under this Act *any statement purporting to be signed by the Director General or an authorized officer which forms part of* or is annexed to the information, complaint or *statement of claim, shall, until the contrary is proved, be evidence of any fact stated therein*:
>
> Provided that this subsection shall not apply to:
>
> (a) a statement of the intent of the accused person or other defendant; or
>
> (b) proceedings for an offence punishable by imprisonment.

[34] The certificate dated 30 September 2020 issued for and on behalf of the Ketua Pengarah Lembaga Hasil Dalam Negeri, Malaysia was exhibited in the affidavit in support of the O 14 application (encl 17 exh NAAN3) and certifies clearly that there is a sum of RM5,592,661.43 in income tax due and payable by D1 and pursuant to s 75A of the ITA by D2 and D3 as well.

[35] In fact, since the entry of the judgment in default of appearance against D1 on 19 May 2020, no attempts at all had been made to have the judgment set aside.

[36] The court also observed that the three months' timeline to appeal to the Special Commissioners for Income Tax ('SCIT') against the notices of assessment and additional assessment as prescribed under s 99 of the ITA has lapsed. On appealing to the SCIT, see *Government of Malaysia v Mohd Najib bin Hj Abd Razak* [2020] 12 MLJ 580; [2020] 9 CLJ 723 at para [29] where Ahmad Bache J in an elaborate judgment said:

> ... Under s 106(3) of the ITA 1967, the court shall not entertain any plea or set a

A defence that the tax claimed is wrongly assessed, excessive, incorrectly increased, or under appeal etc. These are all challenges that go to the merits of the appeal and should be decided by the SCIT as they involve questions of facts and not the court.

B **[37]** In addition, the timeline of 30 days after receipt of the judgment to have the judgment in default of 19 May 2020 set aside as prescribed under O 42 r 13 of the Rules of Court 2012 has also lapsed.

[38] In the circumstances, it is clear that D2 and D3 are up the creek without a paddle.

C

[39] Against the backdrop of the above findings, the court now turns to the remaining issue.

D *Deposing that the defendants have no defence with merit instead of having no defence*

[40] During the presentation of oral submissions on 11 January 2021, counsel for D2 and D3 submitted that with reference to his written E submissions ('encl 22') at para 12 thereof, *the only issue* he wishes to rely on is that with the plaintiff having deposed on affidavit that there is no defence with merit instead of no defence, the application for summary judgment ought to be dismissed. Reliance was placed upon the High Court authority *Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib* which counsel submitted F is similar to the case here.

[41] However, as observed above, with respect, even if this authority is applicable, unlike the facts that obtain in that case, D2 and D3 did not appeal against the notices of assessment. And the authority of Siti Zaliha bt Ghazali to G issue the aforesaid certificate under s 142(1) of the ITA (encl 17 exh NAAN3) is clear and well founded.

[42] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ Rep 14 it was further held by the Supreme Court that:

H

> Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> I *Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under* O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment, merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* [1949] 1 All ER 197; and *European Asian Bank AG v*

Punjab and Sind Bank [1983] 2 All ER 508 at p 516). (Emphasis added.)

[43] Having deposed to the facts in its affidavits which show that D2 and D3 have no defence to the plaintiff's claim which would lead the court to be able to conclude that the issues of fact and law raised by the defendants are not triable, I am of the opinion that for the plaintiff to depose by affidavit that the defendants have no defence with merit is as good as deposing that the defendants have no defence in the circumstances of this case as to enable the court to do its duty to allow summary judgment to be entered.

[44] I observed that in the Federal Court case of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* relied upon by the High Court in *Kerajaan Malaysia v Nooryana Najwa bt Dato Sri Mohd Najib* the Federal Court had used the permissive words '*may* be dismissed' if, inter alia, the affidavit is defective for omitting to state the deponent's belief that there is no defence to the claim. For ease of reference the relevant part of the judgment of the Federal Court is set out below:

> It is to be observed that a case is not within O 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates; and (d) where the application is made in an action against the government (O 73 r 5(1)).
>
> If the plaintiff fails to satisfy either of these considerations, *the summons may be dismissed*. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O 14 r 3 and 4(1)1). (Emphasis added.)

[45] With all due respect, I am of the view that the Federal Court in its wisdom had the foresight to leave intact and available a discretion on the part of the trial judge to do justice to all who comes before the court be they plaintiffs or defendants, if the failure to satisfy a procedural condition is purely one of semantics or technical non-compliance.

[46] The court further observed that *National Company for Foreign Trade v Kayu Raya Sdn Bhd* was decided in 1984. Since then, with effect from 16 May 2002, O 1A of the Rules of Court 2012 came into effect. It provides as follows:

> *Regard shall be to justice*
>
> *In administering these Rules, the court or a Judge shall have regard to the overriding interest of justice and not only to technical non-compliance with these Rules*

[47] The above provision of O 1A came about as a result of the seminal decision of the Federal Court in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 where the late Mohtar Abdullah FCJ said:

> *Numerous judgments can be cited in support of this firm stand on the necessity for a strict adherence of the rules. I agree. However, a judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law*. The judge should be mindful of r 102 of the RCA which provides that 'non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void'. The said rule also provides for the discretionary power of the judge to deal with such irregularity 'in such manner and upon such terms' as the judge thinks fit. Therefore, a fair minded judge should look at all the circumstances of the case before penalising the party who infringes any particular rule of procedure. (Emphasis added.)

[48] I find that saying 'no defence' and 'no defence with merits' is one of semantics and they both mean the same thing. The addition of the words 'with merits', is at best a surplusage to underscore the point being made that there is no defence. This surplusage is a form of a mere technical noncompliance and should not be allowed to stand in the way of having regard to the overriding interest of justice.

[49] In *Syarikat Islamiyah v Bank Bumiputra Malaysia Bhd* [1988] 3 MLJ 218, the plaintiff failed to depose in the affidavit in support of its O 14 application (under the then Rules of the High Court 1980 which is similar to the current O 14 of the Rules of Court 2012) that there is no defence to the action. The senior assistant registrar dismissed the application. On appeal to the High Court judge, the plaintiff filed a supplementary affidavit to make this deposition and the High Court held that the failure to make such a deposition was only a minor defect which did not prejudice the defendant. In this case, the plaintiff did make such a deposition save that it added the words 'with merit'. As it is qualified with 'no defence' ie 'no defence with merit', I find that it did not prejudice D2 and D3 in any way. If at all, it is only irregular in form, and pursuant to O 41 r 4, I am would allow it to be used in evidence. Order 41 r 4 is reproduced below:

> An Affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

[50] On technicalities, it would be instructive to quote from the judgment of our Federal Court in *Palm Oil Research And Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd & another appeal* [2005] 3 MLJ 97; [2004] 2 CLJ 265, a case on the interpretation of a taxing statute, the following:

... And, as may be seen from the above quoted passage those rules in themselves contain one or more safety valves to ensure no injustice is done in consequence of procedural departures.

[51] In this context, I would also refer to the judgment of Ahmad Fairuz JCA (as His Lordship then was) in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561; [2001] 2 CLJ 31 where His Lordship said:

Our Federal Court in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p 189 said:

The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.

In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.

But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.

This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear's Arbitration* [1907] 1 KB 1:

Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are alter all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case. (Emphasis added.)

And in the same case, Ali FJ, said (at p 192):

The general principle, I think, is that rights of parties in an action are not to be defeated by technical objections.

In this connection, we would also like to quote what this court had said in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at p 342, ie:

... After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case ... (Emphasis added.)

Kaikaus J, in *Imtiaz Ahmad v Ghulam Ali* PLD 1963 SC 382 at p 400 said:

Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his. (Emphasis added.)

[52] Before departing from this issue, it is interesting to note that the English

Court of Appeal in *Wasif v Secretary of State for the Home Department; Hossain v Secretary of State for the Home Department* [2016] 1 WLR 2793 quoted with approval the Court of Appeal's decision in *Dr Sengupta and another v Holmes and others* [2002] EWCA Civ 1104 where at para 13 Maurice Kay LJ said:

> *... TWM (totally without merit) means 'no more and no less than bound to fail'.*

CONCLUSION

[53] In the upshot, the court grants an order in terms of the application for summary judgment to be entered against D2 and D3 in the sum of RM5,592,661.43 together with interest thereon at 5%pa from the date of judgment until full settlement and costs of RM4,000.

Application for summary judgment was allowed to be entered against the second and third defendants with costs of RM4,000.

Reported by Rafinie bt Ramli